IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.625 OF 2004
IN
NOTICE OF MOTION NO.2150 OF 2004
IN
S.C.SUIT NO.2483 OF 2004

Malik Mohd. Qasim Noor Mohammed)
aged about 50 years, Occ.: Iron Scrap)
Business, Indian Citizen, Mumbai)
Inhabitant, a person of unsound mind/)
weak mind by next friend Mrs.Shahnazbano)
Qasim Malik, residing at carrying on)
business at Shop No.N/301, Ground Floor)
Meher Bux Lokhand Bazar, Kharwa Gali)
Bapurao Pathe Marg (Falkland Road))
Mumbai 400 004.).. Appellant
(Org.Plaintiff)

Versus

1) Ammar Hussain Taqdir Shaikh)
age : Not known, Occ.: Business)

2) Abdur Raqeeb Abdul Wahid)
Age : Not Known, Occ.: Business)
both Indian Citizens, Mumbai)
Inhabitants, carrying on business)
at Shop No.301/C-D-E, Meher Bux)
Lokhand Bazar, Kharwa Gali)
Bapurao Pathe Marg (Falkland Road))
Mumbai 400 004.).. Respondents
(Org.Defendants)

Mr.A.S.Uraizee for the Appellant.

Mr.A.H.Fernandes for the Respondents.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 18TH OCTOBER 2004

JUDGMENT DELIVERED ON : 5TH NOVEMBER 2004

JUDGMENT :

. By consent, Appeal From Order called out for admission and heard finally.

2. The present Appeal From Order is directed against the order of the trial Court refusing interim relief to the Plaintiff-Appellant herein. A Motion filed by the Plaintiff has been dismissed. However, the Defendants were directed to deposit Rs.2,00,000/- in Court within fifteen days from the date of the order. Accordingly, it appears that the Defendants-Respondents herein have deposited the amount. By an order dated 6th July 2004, this Court had directed the Respondents to pay deficit stamp duty on the agreement of sale incorporated at Exhibit "M" since the Respondents were claiming possession under the agreement. The Respondents were also permitted to move the trial Court to get the documents impounded and to pay the deficit stamp duty as may be determined by the trial Court; within one week from 6th July 2004. Thereafter, it appears that the Defendants have paid the deficit stamp duty.

3. The paternal uncle of the Plaintiff was the tenant of the suit premises. According to the Plaintiff, the suit premises consisted of a mezzanine

floor and the ground floor. Licences and other related records issued by the Corporation were in the name of the uncle. The Plaintiff claimed that he was carrying on the business exclusively after his uncle expired on 19th February 1980. The Plaintiff has also claimed that he was residing in the suit premises besides conducting business from the premises. According to the Plaintiff, on 29th October 2003 the Respondents kidnapped him and forced him to sign an (i) agreement of sale, (ii) affidavit and (iii) General Power of Attorney. The Plaintiff has claimed that his brother was also instrumental in coercing the Plaintiff into signing the said documents. Since the Respondents took possession of the suit premises, the Plaintiff filed the present Suit for injunction and declaration. The Plaintiff claimed that he was a person of unsound or weak mind and, therefore, prayed that his wife be permitted to represent him as *guardian-ad-litem*. A declaration was sought that the three documents purportedly being (i) agreement for sale, (ii) affidavit and (iii) General Power of Attorney were false and not binding on the Plaintiff. A temporary injunction against the Defendants was also prayed for, restraining the Defendants from taking possession of the suit premises.

4. It appears that under the agreement of sale which was signed on 29th October 2003 by the Plaintiff

and his brother on the one hand and the Respondents-Defendants on the other, the Defendants agreed to purchase the suit premises for a total amount of Rs.7,00,000/- as consideration. An amount of Rs.1,00,000/- was paid to the Vendors which fact has been incorporated in the agreement of sale. The balance amount of Rs.6,00,000/- was to be paid within two months of the execution of the agreement. There is no dispute that the entire amount has been paid to the Vendors. The Plaintiff's share of the consideration has been paid to him. The Bank statement of the joint account of the Plaintiff and his wife indicates that the Plaintiff has been paid an amount of Rs.3,00,000/- by the Defendants. The Plaintiff claims that he is residing in the suit premises and, therefore, an injunction ought to have been granted in his favour. In any event, according to the Plaintiff, a Receiver ought to have been appointed of the suit premises so that the property should not be wasted.

5. The trial Court had appointed a Commissioner to inspect the premises in order to ascertain whether the Plaintiff was in actual possession of the suit premises. Commissioner has filed his report. The trial Court after considering this report has found that the suit premises were owned by the Mumbai Municipal Corporation (hereinafter for short referred to as "the

Corporation"). The trial Court has also found that the document on which the Defendants claimed that they were in possession was not registered and, therefore, according to the trial Court prima facie it could not be said that the Defendants had acquired any title to the suit property. However, the trial Court held that the possession of the suit premises was handed over to the Defendants. The trial Court has also found that the Vendors on the Plaintiff's own admission has received Rs.5,00,000/- and only an amount of Rs.2,00,000/- remained to be paid by the Defendants. The trial Court has also concluded that the Plaintiff has been paid his share of the consideration. The trial Court disbelieved the version of the Plaintiff that he is in possession of the suit premises or that he was residing there with his family and has given cogent reasons for the same.

6. The Plaintiff has claimed that the documents executed by him should be declared as not binding on him since he is of unsound mind. However, there is no documentary proof at all produced either before the trial Court or before this Court to indicate that the Plaintiff in fact is or was of unsound mind. Furthermore, the Plaintiff has enjoyed the amount deposited by the Defendants in the joint account held by him with his wife, being the consideration received for sale of the suit premises. In my view, therefore, the

claim of the Plaintiff that he is entitled to an interim injunction is without any basis. No case has been made out by the Plaintiff that he is in actual physical possession of the suit premises. The trial Court, however, has considered the fact that an amount of Rs.2,00,000/- remained to be paid and, therefore, directed the Defendants to deposit the same which order has been complied with by the Defendants.

7. The learned Counsel for the Plaintiff submits that there was documentary proof like cards issued to the Plaintiff to indicate the polling station, a telehpone bill for the period 1st June 2001 to 31st July 2001, electricity bill for the period 1st June 2003 to 1st August 2003, etc. to establish the Plaintiff's possession. However, these documents do not further the Plaintiff's case since these documents are obviously much prior to the agreement of sale after which the Defendants have come into possession of the suit premises. Moreover, the prayer for appointment of a Court Receiver is also without any basis. Reliance was placed by the learned Counsel for the Plaintiff on the judgment of this Court in the case of *Mulji Umershi Shah* vs. *Paradisia Builders Pvt. Ltd.*, **1998 (1) ALL MR 36**, where the possession for grant of temporary injunction and appointment of Receiver had been considered. According to the learned Counsel, this judgment

indicates that the Court can suo motu while refusing temporary injunction appoint a Receiver if the facts and the circumstances justify such an action. He urges that this Court should appoint the Court Receiver in case it is not inclined to grant the prayer for temporary injunction. There is no doubt that, as held by the learned Single Judge of this Court in *Mulji Umershi Shah* (supra), a Receiver can be appointed without there being an application by either party while rejecting the application for temporary injunction. The Court has given instances when the Receiver can be appointed. The learned Single Judge has observed that when a party who does not have any right to the property comes into possession of the property unlawfully and illegally, and may seek to protect his possession by filing a Suit for injunction. The Court may find that such a person has no right, title or interest in the property and is not in lawful possession. In such cases, the Court could order appointment of Receiver while refusing temporary injunction. However, the learned Single Judge has cautioned that this is an exceptional order which can be passed to prevent a larger mischief if the facts and circumstances of the case so warrant.

8. In the present case, the Defendants have come into possession of the suit property based on an agreement of sale which has now been duly stamped.

Prima facie, therefore, they have come into possession on the basis of this document which, unless it is set aside, gives them a right to occupy the premises. There is no dispute that the Defendants have paid the consideration agreed under the agreement of sale. The Plaintiff, therefore, cannot now rescind from this agreement of sale on the basis he is of unsound mind unless there is some documentary evidence to indicate that he had signed the documents without knowledge of what he was doing because of unsoundness or mind or mild schizophrenia as claimed by the Plaintiff.

9. The reliance placed on the judgment of another learned Single Judge of this Court in the case of *Ganesh D. Daivajna* vs. *Prakash S. Salkar*, **2000 (3) Mh.L.J. 347**, does not take the case of the Plaintiff any further. This Court has observed that before granting injunction the person claiming possession of a property must establish that he has got title to remain in possession in order that the Court grant an injunction. The question of possession presupposes that it is lawful possession. It is obvious that the Plaintiff does not have any case for claiming lawful possession and, therefore, his claim for a temporary injunction cannot be accepted. The trial Court has considered all these factors and has refused injunction. I see no reason to differ from these findings of the trial Court. Hence,

Appeal From Order dismissed.

10. In view of the dismissal of the Appeal From Order, nothing survives in Civil Application No.845 of 2004 and the same is disposed of accordingly.

11. Certified copy expedited.